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toronto hydro electric system

2011 February 7

via RESS e-filing – original to follow by courier

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge St, 27th Floor
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

RE: EB-2010-0295
Recovery of Late Payment Penalty Settlement Amounts
THESL's Argument-in-Chief

Pursuant to the Board's Procedural Order No. 3, enclosed is THESL's Reply Argument in this Proceeding.

Yours truly,

[Original signed by]

Colin McLorg
Manager, Regulatory Policy and Relations
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:CJM/acc

cc: Alan Mark, Jennifer Teskey, EDA Counsel, by email only
Rick Zebrowski, Maurice Tucci, EDA, by email only

EB-2010-0295: Recovery of Amounts Related to LPP Settlement

Reply Argument of Toronto Hydro Electric System Limited

Introduction

On its own motion, the Board convened a proceeding under file number EB-2010-0295 (the "LPP Proceeding") to determine whether certain Affected Electricity Distributors (Distributors) should be allowed to recover from their ratepayers the costs and damages incurred as a result of the Minutes of Settlement (Settlement) in the late payment penalty (LPP) class action (more particularly described in the associated Notice of Hearing), and if so, the form and timing of such recovery.

Pursuant to the direction given by the Board in the Notice of Hearing, Toronto Hydro-Electric System Limited ("THESL") cooperated with the Electricity Distributors Association ("EDA") to produce and file on November 8, 2010 the collective evidence required by the Board. Subsequent to the filing of that evidence, THESL advised the Board by letter dated November 10, 2010 of THESL's view that further evidence particular to the circumstances of THESL would be necessary in order to produce a complete and transparent record in the LPP Proceeding.

That supplementary evidence pertained to the elimination of certain legal costs from the amount that would be recoverable by THESL in connection with this proceeding, and to both the method of allocation of the recoverable amount to rate classes and the manner of recovery of those amounts.

Pursuant to Procedural Order No. 3, Board Staff and intervenors filed submissions on the evidence put forward by the EDA and THESL. Also pursuant to Procedural Order No. 3, THESL makes these submissions in reply, which address:

- The submissions of the School Energy Coalition (SEC) with respect to the fairness of distributors recovering costs and damages arising from the Settlement from electricity ratepayers;
- The submissions of SEC regarding LPPs charged for services other than electricity distribution; and
- The submissions of SEC regarding procedural options available to the Board with respect to determining the recoverable amounts for each distributor.

Fairness of Recovery of the Amounts Arising from Settlement

Generally with respect to the eligibility for recovery of the subject costs, and the reasonableness and fairness of such recovery, THESL continues to rely on the submissions in argument and reply of the EDA and further on the submissions of Board Staff.

SEC's portrayal of the LPPs charged by distributors as unjust ignores two central features of this case: first, that such charges were made pursuant to proper rate orders of competent authorities; and second, that distributors did not profit from those charges. SEC furthermore distorts the facts by claiming that ratepayers were not reimbursed 'directly' for LPP amounts charged; while this is narrowly and irrelevantly true with respect to after-the-fact reimbursement of LPP charges to individual customers who first incurred them, it is nevertheless the case that LPP revenues went to reduce distribution rates from what they would otherwise have been, and it is clear that ratepayers as a whole benefited from that application of LPP revenues.

Recovery of Amounts Not Related to Electricity Distribution

SEC submits that not all of the Allocated Amounts should be allowed because not all of the LPPs were related to electricity distribution.

THESL agrees that it would be improper and outside of the Board's authority for it to authorize electricity rates to recover costs not related to electricity distribution. However, that is not the case here, and all of the business of MEUs, and later LDCs, was that of electricity distribution as it was defined at the time. To the extent that certain utilities did or do now bill customers for things other than electricity, such as water, these activities have properly been excluded from the Settlement and this proceeding.

Otherwise, the Board is of course aware that its own rules under the Affiliate Relationship Code prevented LDCs from doing anything but electricity distribution during the latter part of the exposure period. During the period prior to the onset of OEB regulation of electricity distributors i.e., prior to industry re-structuring, 'electricity distribution' was more widely defined and included such things as water heater rentals and for that matter the sale of commodity. SEC's implicit inference is that LPPs related to water heater rentals (for example) ought not to be allowed now, since LDCs no longer conduct such businesses within the regulated entity. This is simply fallacious and should be disregarded by the Board. By the same reasoning the portion of LPP revenues related to commodity should now be used to determine a proportionate share of the Allocated Amount to be borne by generators. Those MEU businesses were 'electricity distribution' at the time and the same rules with respect to authorized rates and the same use of LPP revenues applied to them as later applied to the redefined businesses. The MEU businesses which distributed electricity and

provided other incidental services to customers such as water heater rentals were continued as LDCs, and the Courts have recognized that fact.

Options for Setting of Recoverable Amounts and Rates

THESL agrees with SEC that other avenues for recovery of the overall Allocated Amounts should be exhausted for each distributor first before determining the net amount remaining for recovery through rates. Conceptually, these other avenues could include

- Prior recovery of legal costs through rates (as was the case for THESL, but evidently not for any other distributor);
- Recovery of costs through insurance coverage;
- Shared liability with another legal entity.

While THESL rejects the validity of the third avenue, it acknowledges that the Board will require that it be satisfied that all possible avenues of recovery have been exhausted.

SEC has submitted at its paragraph 15 that distributors who wish to recover the subject costs should either burden the Board with "i) all documents showing that all relevant liabilities were effectively transferred to the LDC, ii) a copy of the general liability insurance in place at of exposure, and iii) evidence showing that none of the LPPs applied to non-electricity distribution", or accept an arbitrarily reduced recovery.

SEC's suggested approach is punitive, inappropriate and inefficient. First, as set out above, there was no 'non-electricity distribution' that properly entered the calculation of any of the amounts in question. Otherwise, THESL submits that the Board may satisfy itself on all of the items it may wish to define by simply requiring from all Affected Distributors an affidavit, in a form prescribed by the Board, confirming the relevant facts for each item (for example, either that monies were recovered and deducted from the amount to be recovered in rates, or that no monies were or can be recovered).

SEC's analogy to the approach used for Regulatory Assets fails. In that setting, there was a live question for each distributor as to the prudence of its Transition Cost expenditures, and the regulatory costs to both the distributors individually and to the Board and intervenors would have been substantial were the Board to have required a detailed examination in each case. The Board determined then that for cases within pre-determined thresholds, the approach it offered distributors was expedient for the purposes at hand.

In this case there is no individual, distributor-by-distributor determination of the prudence of the expenditures in question. The overall question of prudence will be determined in this proceeding

and the individual distributor shares of the liability were determined formulaically on a reasonable basis. What remains after the Board's determination of the total amount allowed for recovery and the method of allocation is simply confirmation by each utility of amounts if any that could be recovered by means other than distribution rates, and a mechanistic calculation of the resulting rate riders.

Therefore the Board should reject SEC's suggestion that either

a) an arbitrary reduction be imposed on the recoverable amount for distributors; or
b) the Board and distributors undertake a needless, burdensome, and expensive process to establish facts that can otherwise be confirmed to the Board's satisfaction using a simple and cost-effective approach.

All of which is respectfully submitted this 7th day of February, 2011.